

New Mexico

WATER RIGHTS FACT SHEET

August 15, 2001

Water Rights System:

New Mexico's water law is based on the doctrine of prior appropriation or "first in time - first in right." All waters in New Mexico are declared to be public and subject to appropriation for beneficial use. There are five basic components of a water right in New Mexico: Point of diversion (or constructed work), place of use, purpose of use, owner, and quantity. Although these factors are statutorily required, past court decisions, legal opinions, and the discretion of the state engineer allow flexibility in the interpretation of these basic requirements. The state's water law is presently in force in New Mexico Statutes Chapter 72.

Responsible Agency and Law:

The State Engineer, appointed by the Governor and confirmed by the State Senate, has broad authority over the supervision, appropriation and distribution of New Mexico's surface and groundwater. This office is responsible for supervision, measurement, appropriation, and distribution of the state's water. The State Engineer performs these duties according to state statute and according to the adjudication of the courts.

Application Process:

Apart from water rights acquired before 1907 and **small scale stockwatering (10 acre-feet or less)**, a permit from the State Engineer is required to appropriate water, change the point of diversion, change the location of wells in declared basins, divert or store water, or change the place or purpose of water use. The types of applications and their associated fees can be seen in Appendix One. An application for a new appropriation or a change in an existing water right must be advertised once a week for three consecutive weeks in a local newspaper. Those believing that their water rights would be impaired by the granting of the application may file a protest. Protests may also be filed on the basis that granting the application will adversely effect public welfare, or would be contrary to the conservation of water within the state. The protest must be filed within ten days of the last publication notice of the application. If a settlement cannot be reached, the applicant can request a hearing before the State Engineer (or the appointed hearing examiner). The burden of proof in the hearing is on the applicant, and appeals go to the district court.

When considering an application for permit, the State Engineer considers the following: The existence of unappropriated waters; if the application will impair existing water right; whether granting the application would be contrary to the conservation of water within the state; and if the application will be detrimental to the public welfare. The State Engineer can then issue a permit either in whole, in part, or conditioned to ensure non-impairment of water rights.

Once a permit is approved, the permittee must complete the work necessary to put the water to the intended use. Upon completion of the work, the State Engineer issues a certificate which quantifies the right and describes the point(s) of diversion, place of use, and purpose of use. After full use of the water is made, the permittee must file proof of application of water to beneficial use,

and upon inspection the State Engineer issues a license to appropriate water. The license defines the extent and conditions of the use.

There is a new requisite in New Mexico that prior to someone obtaining a water right involving the use of public lands, the person must prove they actually have a permit to use the public lands. This requirement is described in section 72-12-1 of New Mexico's water right's code.

The time frame involved in obtaining a water right in New Mexico is extremely variable. If an application is not complex and is not protested, it takes a minimum of 3 months to obtain approval. If, however, the application is protested, hearings are held, and complexities are involved. The State Engineer can then take much longer (in some cases decades) to reach a decision.

Point of Diversion and Change Procedures:

Statutory law states that beneficial use in New Mexico requires a diversion of water from its natural path to a place where that water produces revenue or sustains human life. Court rulings, however, have found that this requirement does not apply to all beneficial uses. As we will see below in the instream flow discussion, recreational use, for example, does not require a point of diversion.

One attribute of a water right in New Mexico is the right to change the point of diversion, the place of use, and the purpose of use. These changes, however, may not impair any other water right, may not be contrary to the conservation of water, and may not be detrimental to the public welfare. In addition, a change in diversion, place, or purpose may not increase consumptive use. Any such changes in surface or ground water require the filing of an appropriate application with and approval by the State Engineer.

State Recognized Beneficial Uses:

The State of New Mexico does not have an official list of approved beneficial uses. The recognition of a beneficial use is at the discretion of the State Engineer. According to state statute, a beneficial use in New Mexico requires a diversion of water from its natural path to a place where that water will produce revenue or sustain human life. Recent court decisions, however, have changed this allowing for beneficial uses without a diversion requirement. Therefore, the State Engineer has broad authority in considering what constitutes beneficial use in New Mexico. Recognized beneficial uses in the past have included:

Agriculture Commercial Domestic Industrial	Recreational Uses State Conservation Goals Stockwatering
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Groundwater:

The New Mexico ground water code was enacted in 1931. Groundwater procedures closely parallel those for surface water, with several important differences. A permit to drill a well and appropriate water is not required in areas outside of declared "underground water basins". Within underground water basins, however, use is regulated by the State Engineer. The State Engineer has the authority to establish these basins when regulation is necessary to protect prior appropriations, ensure water is put to beneficial use, and to maintain orderly development of the state's water resources. There are currently 33 declared underground water basins throughout New Mexico.

Under New Mexico groundwater law, only well drillers licensed by the State may drill or alter wells (with a diameter larger than 2 3/8 inches) within the boundaries of declared underground water basins. The State Engineer is required to issue permits within declared underground water basins in certain instances (see Appendix Four).

Water Rights:

Water rights in New Mexico can be held by any entity accept by the State Engineer. In other words, rights can be held solely, jointly, collectively, or in the name of a corporation, organization, or government agency. All water appropriated for irrigation (unless otherwise stated) is appurtenant to the land upon which it is used and it cannot be transferred to other lands or used for other beneficial purposes unless the water right is separated from the land. A water right can be severed from the land through an application to the State Engineer.

Water rights in New Mexico can be transferred from one entity to another, but a change application must be filed and approved by the State Engineer. Water rights in New Mexico are considered real property and they may be bought or sold. A water right can be conveyed as part of a piece of property or separate (as long as that water right has been severed from the land by an approved application through the state engineer).

A water right in New Mexico can be lost by forfeiture. When all or any part of appropriated water is not put to beneficial use for a period of four consecutive years, the State Engineer issues a notice of non-use. If the failure to beneficially use the water persists for one more year, the unused water is forfeited and becomes part of the public domain. Forfeiture does not occur, however, if the reason for non-use is beyond the control of the owner.

Adjudications:

New Mexico has adjudicated water rights since 1907. Adjudication is through a program of hydrographic surveys and suits. The State Engineer is required to conduct surveys of every stream system in the state. During a survey, data is collected to help the court determine the amount of water to be awarded to each claimant. In an adjudication suit, each claimant has an opportunity to present evidence of water right to the court. The completion of adjudication results in a court decree outlining the priority, amount, purpose (determination of use), periods, and place of water use.

Ongoing Adjudications:

Currently there are ten ongoing adjudications in New Mexico.

Instream flows:

New Mexico's instream flow program is complex, unclear, and continually evolving. New Mexico does not have a legislated instream flow program, and instream flow is not a recognized beneficial use. Recent case law, however, has allowed the development of an instream flow program in New Mexico. In 1998, the New Mexico Attorney General issued a legal opinion concluding that the transfer of a consumptive water right to an instream flow right is allowable under state law. The legal opinion determined that instream uses such as recreation and fish and wildlife habitat are beneficial uses, and that transfers of existing water rights to instream flows are not expressly prohibited. Prior to this opinion, New Mexico was the only state that did not recognize instream flow as a beneficial use.

The Attorney General's opinion is based upon case law. The New Mexico Supreme Court first recognized instream flows as a beneficial use in *State Game Commission v. Red River Valley Co.* in 1945. In that decision, the court ruled that "beneficial use", in relationship to unappropriated water included recreation and fishing. In 1972, the court further held that a diversion was

necessary to establish *agricultural* water rights (Reynolds v. Miranda). Based upon these rulings the Attorney General found that recreational use is a beneficial use and that a diversion was not necessary to establish a water right other than for agricultural use.

The 1998 Attorney General's opinion is limited to the context of transferring existing water rights. The opinion notes that new appropriations of water for instream flow are not subject to this precedent. Although the opinion concludes that there are no legal barriers to the transfer of existing water rights to an instream flow right, the State Engineer still has the responsibility for approving such a transfer. Transfers are subject to the application process outlined above, and the State Engineer's office has further indicated that it will require any instream flow right to be conditioned upon gauging throughout the protected stream reach.

Recognized Beneficial Uses for Instream Flow:

Instream flow in itself is not recognized as a beneficial use. It appears, however, that water can be dedicated to instream flow for the purpose of recreation and fish and wildlife habitat.

Holdership of Instream Flow Water Rights:

The Attorney General's opinion does not explicitly address the issue of ownership of instream flow rights. It may be assumed that since ownership of other types of water rights are not limited, instream flow rights could be held by a public or private entity. Current law, however, is unclear and continues to develop in this area.

Quantification Requirements and Procedures:

Since instream flow is not statutorily regulated, there are no explicit quantification requirements in New Mexico. Approval of water transfers to instream flow is subject to the approval of the State Engineer. The State Engineer has the authority to place restrictions on the approval of an instream flow, therefore quantification requirements are currently at the discretion of the State Engineer.

BLM Specific Information:

The New Mexico office of the State Engineer has not required a water applicant to have the necessary right-of-way approved from the BLM prior to the approval of the application. The new requirements that an applicant prove they have a permit to use public lands prior to obtaining a water right for use on that land, however, changes this precedent.

The BLM is required to pay any applicable fees. A list of these fees can be seen in Appendix One.

The BLM is involved in all ten of New Mexico's ongoing adjudications.

With regard to federal reserved water rights, the BLM holds reserved rights on the Red River Wild and Scenic River. This reserved right was acquired through the adjudication of the Red River basin. The BLM has also applied for reserved rights on the Rio Chama Wild and Scenic River, but that adjudication is ongoing. In addition to Wild and Scenic River reserved rights, the BLM holds numerous Public Water Reserve 107 reserved water rights.

The New Mexico office of the State Engineer has recently threatened to deny federal agencies any claim to stockwater rights. The rationale is the agencies do not own livestock and therefore do not put the water to beneficial use. There is, however, a history of federal agencies being granted stockwater claims in New Mexico.

The relationship between the New Mexico office of the State Engineer and the Bureau of Land Management can be characterized as business-like. With the recent requirement for proof of permits on public lands, there stands to be more interaction between the two agencies. In the past, however, interaction has been limited to the BLM's proposed applications and to the BLM's protest of other applications. The new requirement for proof of permit could potentially lead to more cooperative interaction. The BLM is in the process of coordinating action within the agency for the approval of these permits and there is consideration of making the State Engineer office a cooperative partner.

Official Contact:

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Appendix One: Types of Applications

Ground Water Rights Applications:

1. Declaration of Water Right \$1.00
2. Application to Appropriate (Domestic, Stock) \$5.00
3. Application to Change Location Domestic Well \$5.00
4. Application to Repair or Deepen Domestic Well \$5.00
5. Application to Appropriate Irrigation, Municipal, Industrial or Commercial Use \$25.00
6. Application for Supplemental Well \$25.00
7. Application to Change Place or Purpose of Use \$25.00
8. Application to Change Location of Well and Place and/or Purpose of Use \$50.00
9. Application for Extension of Time \$25.00
10. Proof of Completion of Well and Proof of Beneficial Use \$25.00
11. Application to Change Point of Diversion and Place and/or Purpose of Use from Surface to Ground Water \$50.00

Surface Water Rights Applications:

1. Declaration of Water right \$1.00
2. Declaration of Livestock Dam \$1.00
3. Application to Appropriate \$25.00
4. Application to Change Point of Diversion \$25.00
5. Application to Change Place and/or Purpose of Use \$50.00
6. Application to Change Point of Diversion and Place and/or Purpose of Use \$50.00
7. Application for Extension of Time \$50.00
8. Proof of Completion of Well \$25.00
9. Proof of Beneficial Use \$25.00
10. Certificate of Construction \$25.00
11. License to Appropriate \$25.00
12. Application to Change Point of Diversion and Place and/or Purpose of Use from Ground to Surface Water \$50.00

Miscellaneous Applications:

1. Change of Ownership \$2.00
2. Application for Well Driller's License \$50.00
3. Application for Renewal of Well Driller's License \$20.00
4. Application to Amend Well Driller's License \$5.00
5. Hearing Fee \$25.00

Appendix Two: Cases when the State Engineer is required to issue a permit within an underground water basin:

1. An appropriation of up to three acre-feet per year for a well for water livestock, domestic use, or non-commercial irrigation (trees, lawn, garden, etc.) smaller than one acre.
2. An appropriation of up to three acre-feet for a maximum of one year for water use in prospecting, mining, or constructing public works, if the State Engineer finds that the proposed use will not impair existing water rights.